

# ***PR 2010/22 - Income tax: Great Southern 2007 High Value Timber Project - Replacement Responsible Entity***

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## Product Ruling

### Income tax: Great Southern 2007 High Value Timber Project – Replacement Responsible Entity

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#### **! This publication provides you with the following level of protection:**

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

## **No guarantee of commercial success**

The Commissioner **does not** sanction or guarantee this product. Further, the Commissioner gives no assurance that the product is commercially viable, that charges are reasonable, appropriate or represent industry norms, or that projected returns will be achieved or are reasonably based.

Potential participants must form their own view about the commercial and financial viability of the product. The Commissioner recommends a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential participants by confirming that the tax benefits set out in the **Ruling** part of this document are available, **provided that** the scheme is carried out in accordance with the information we have been given, and have described below in the **Scheme** part of this document. If the scheme is not carried out as described, participants lose the protection of this Product Ruling.

## **Terms of use of this Product Ruling**

This Product Ruling has been given on the basis that the entity(s) who applied for the Product Ruling, and their associates, will abide by strict terms of use. Any failure to comply with the terms of use may lead to the withdrawal of this Product Ruling.

## What this Ruling is about

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1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified in the Ruling section (below) apply to the defined class of entities who take part in the scheme to which this Ruling relates. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated.
2. In this Product Ruling this scheme is referred to as the Great Southern 2007 High Value Timber Project or simply as 'the Project'.

### Class of entities

3. This part of the Product Ruling specifies which entities can rely on the tax benefits set out in the Ruling section of this Product Ruling and which entities cannot rely on those tax benefits. In this Product Ruling, those entities that can rely on the tax benefits set out in this Ruling are referred to as a Grower.
4. The class of entities who can rely on those tax benefits consists of those entities that:
  - were accepted to participate in the Project as specified in PR 2007/7 between 14 February 2007 and 30 June 2007 inclusive; and
  - continue to participate in the Project after the date this Ruling is made.

They must have a purpose of staying in the scheme until it is completed (that is, being a party to the relevant agreements until their term expires), and deriving assessable income from this involvement.

5. The class of entities who can rely on the tax benefits set out in the Ruling section of this Product Ruling does **not** include entities who:
  - have terminated their involvement in the scheme;
  - have their interest terminated by the Responsible Entity (see paragraphs 41 and 45 of this Ruling);
  - intend to terminate their involvement in the scheme prior to its completion, or who otherwise do not intend to derive assessable income from it; or
  - were accepted into this Project before 14 February 2007 or after 30 June 2007.

***Superannuation Industry (Supervision) Act 1993***

6. This Product Ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA). The Commissioner gives no assurance that the scheme is an appropriate investment for a superannuation fund. The trustees of superannuation funds are advised that no consideration has been given in this Product Ruling as to whether investment in this scheme may contravene the provisions of SISA.

**Qualifications**

7. The class of entities defined in this Product Ruling may rely on its contents provided the scheme actually carried out is in accordance with the scheme described in paragraphs 34 to 47 of this Ruling and paragraphs 26 to 69 of PR 2007/7.

8. If the scheme actually carried out is materially different from the scheme that is described in this Product Ruling, then:

- this Product Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Product Ruling may be withdrawn or modified.

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**Date of effect**

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10. This Product Ruling applies from 3 June 2010, the day Lowell Capital Limited (LCL) was appointed Responsible Entity. It applies only to the specified class of entities that entered into the scheme from 14 February 2007 until 30 June 2007, being the period specified in PR 2007/7. This Product Ruling provides advice on the availability of tax benefits to the specified class of entities.

11. However this Product Ruling only applies to the extent that there is no change in the scheme or in the entity's involvement in the scheme.

## **Changes in the law**

12. Although this Product Ruling deals with the income tax laws enacted at the time it was issued, later amendments may impact on this Product Ruling. Any such changes will take precedence over the application of this Product Ruling and, to that extent, this Product Ruling will have no effect.

13. Entities who are considering participating in the scheme are advised to confirm with their taxation adviser that changes in the law have not affected this Product Ruling since it was issued.

## **Note to promoters and advisers**

14. Product Rulings were introduced for the purpose of providing certainty about tax consequences for entities in schemes such as this. In keeping with that intention the Commissioner suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Product Ruling has issued.

## **Goods and Services Tax**

15. All fees and expenditure referred to in this Product Ruling include the Goods and Services Tax (GST) where applicable. In order for an entity (referred to in this Ruling as a Grower to be entitled to claim input tax credits for the GST included in its expenditure, it must be registered or required to be registered for GST and hold a valid tax invoice.

## **Previous Rulings**

16. Product Ruling PR 2007/7 is withdrawn on and from 10 November 2010. PR 2007/7 still applies for Growers in relation to the deductibility of fees and other costs incurred between 14 February 2007 and 3 June 2010, the day LCL was appointed Responsible Entity.

# **Ruling**

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## **Application of this Ruling**

17. Subject to the stated qualifications, this part of the Product Ruling sets out in detail the taxation obligations and benefits for a Grower in the defined class of entities who entered into the scheme described at paragraphs 34 to 47 of this Ruling and paragraphs 26 to 69 of PR 2007/7.

18. The Grower's ongoing participation in the Project constitutes the carrying on of a business of primary production.

**Small business concessions**

19. From the 2007-08 income year a range of concessions, previously available under the Simplified Tax System, became available to an entity if it carries on a business and satisfies the \$2 million aggregated turnover test (a 'small business entity').

20. A small business entity can choose the concessions that best suit its needs. Eligibility for some small business concessions is also dependent on satisfying some additional conditions. Because of these choices and the eligibility conditions the application of the small business concessions to Growers who qualify as a 'small business entity' is not able to be dealt with in this Product Ruling.

**Assessable income*****Sections 6-5***

21. That part of the gross sales proceeds from the Project attributable to the Grower's produce, less any GST payable on those proceeds (section 17-5), will be assessable income of the Grower under section 6-5.

**Deductions for Additional Contributions and Interest*****Section 8-1 and Division 27***

22. If a Grower is registered or required to be registered for GST, amounts of outgoing incurred would need to be adjusted as relevant for GST (for example, input tax credits) (Division 27).

23. Additional Contributions in respect of a Grower's woodlots are deductible under section 8-1 in the income year that they are incurred (subject to the prepayment rules, see paragraph 25 of this Ruling).

24. Interest expense is deductible under section 8-1 where the Grower has funded their participation in the Project through a loan on the terms described in paragraphs 64 to 69 of PR 2007/7. Interest will also be deductible on loans that have been taken over by other financiers. The deductibility or otherwise of interest for any other finance is outside the scope of this Ruling.

***Prepayments and section 82KZMF***

25. Where a Grower, makes a total payment for Additional Contributions of \$1,000 or more in any income year, the deduction allowable will be subject to apportionment over 10 years under section 82KZMF of the *Income Tax Assessment Act 1936* (ITAA 1936) (see paragraphs 63 to 67 of this Ruling).

**‘CGT event’ within 4 years for Growers who are ‘initial participants’****Section 82KZMGA**

26. A deduction for the Establishment Services Fee referred to in PR 2007/7 is not allowable where a ‘CGT event’ happens in relation to a Grower’s interest before 1 July 2011 (subsection 82KZMGA(1) of the ITAA 1936).

27. The appointment of LCL as the replacement Responsible Entity for the Project is not a CGT event in relation to a Grower’s interest. However, if a CGT event does occur before 1 July 2011 and the deductions for these amounts have already been claimed by a Grower, the Commissioner may amend their assessment at any time within two years after the end of the income year in which the ‘CGT event’ happens. The Commissioner’s power to amend in these circumstances applies despite section 170 of the ITAA 1936 (subsection 82KZMGA(2) of the ITAA 1936).

28. Growers whose deductions are disallowed are still required to include in their assessable income the market value of the interest at the time of the ‘CGT event’ or the decrease in the market value of the interest as a result of the ‘CGT event’ (see paragraphs 53 to 55 of this Ruling). The CGT event mentioned in paragraph 82KZMGA(1)(b) of the ITAA 1936 does not include a CGT event that happens because of circumstances outside the Grower’s control (subsection 82KZMGA(1A) of the ITAA 1936).

**Division 35 – deferral of losses from non-commercial business activities****Section 35-55 – annual exercise of Commissioner’s discretion**

29. For each of the income years ending 30 June 2011 to 30 June 2026, the Commissioner will exercise the discretion in subsection 35-55(1) once the following conditions are satisfied for the year concerned:

- the Grower carried on their business of afforestation during the income year;
- the business activity that is carried on is not materially different to that in the scheme described in this Product Ruling; and
- the Grower has incurred a taxation loss for the income year from carrying on that business activity.

30. If these conditions are met for a given year, the Commissioner will exercise the discretion for that year under:

- paragraph 35-55(1)(b) for a Grower in the Project who satisfies the income requirement in subsection 35-10(2E); and
- paragraph 35-55(1)(c) for a Grower in the Project who does not satisfy the income requirement in subsection 35-10(2E).

31. If the Commissioner determines that the discretion will not be exercised for a particular year or years the Grower will be informed of that decision and the reasons. In any year where the discretion is not exercised, losses incurred by a Grower will be subject to the loss deferral rule in section 35-10 and the Grower will not be able to offset the losses from the Project against other assessable income.

32. The issue of this Product Ruling of itself does not constitute the exercise of the Commissioner's discretion in subsection 35-55(1) for any income year.

### **Anti-avoidance provisions**

#### ***Section 82KL and Part IVA***

33. For a Grower who continues participation in the Project and incurs expenditure as required by the Land and Management Agreement and Land Interest Agreement, the following provisions of the ITAA 1936 have application as indicated:

- section 82KL does not apply to deny the deductions otherwise allowable; and
- the relevant provisions in Part IVA will not be applied to cancel a tax benefit obtained under a tax law dealt with in this Ruling.

## **Scheme**

34. The scheme that is the subject of this Ruling is identified and described in paragraphs 26 to 69 of Product Ruling PR 2007/7 and in the following:

- additional documents, correspondence and emails received on 27 July 2010, 30 July 2010, 13 August 2010, 24 August 2010, 26 August 2010, 31 August 2010 and 8 September 2010;
- **Forest Right Agreement (Land Interest Agreement)** between each Grower and Lowell Capital Limited (LCL) received on 30 July 2010 (Forest Right Agreement) and **Lease** received on 30 July 2010; and
- **Land and Management Agreement** to be entered into by each Grower and Lowell Capital Limited (the Responsible Entity), received on 30 July 2010.

**Note:** certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.



35. The documents highlighted are those that a Grower has entered into. For the purposes of describing the scheme to which this Ruling applies, there are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Grower, or any associate of a Grower, will be a party to, which are a part of the scheme. All Australian Securities and Investment Commission requirements are, or will be, complied with for the term of the agreements.

### **Overview**

36. The main features of the Great Southern 2007 High Value Timber Project are those that were set out in paragraphs 26 to 69 of PR 2007/7 with changes to those features set out in the following paragraphs.

### **Replacement of Responsible Entity**

37. LCL has been appointed as the Responsible Entity of the Project from 3 June 2010 and will take over the rights and responsibilities set out in the Constitution, Land and Management Agreement, Lease and Forest Right Agreement.

### **Constitution**

38. Growers will be required to make additional contributions to fund the ongoing maintenance for the remainder of the Project. LCL will issue to each Grower an invoice for \$100 per woodlot (Additional Contribution) each year for the first five years (Five Year Period) after LCL becomes Responsible Entity of the Project. Growers will not be required to make any further contributions after the Five Year Period.

39. Alternatively, a Grower may choose to pay an upfront lump sum payment of \$400 per woodlot in satisfaction of all Additional Contributions for the Five Year Period.

40. For any Woodlot in respect of which a Grower does not pay the Additional Contribution in any year during the Five Year Period, the Grower will be required to pay an additional fee (Non-Contribution Additional Fee) to the Responsible Entity representing the following portions of the Net Proceeds of Sale relating to that Woodlot, as per the table below:

first year of non payment	20%
second year of non payment	20%
third year of non payment	60%

41. After three years of non-payment a Grower will have no entitlement because the Non-Contribution Additional Fees will equal 100% of their share of the Net Proceeds of Sale. The Responsible Entity may terminate that Grower's Agreements and remove the Grower from the Register.

42. A Grower may make further contributions in addition to their Additional Contribution (Increased Contribution). A Grower who chooses to make an Increased Contribution will be entitled to a share of the Non-Contribution Additional Fee (Increased Contribution Entitlement). The tax consequences of the Increased Contribution are outside the scope of this Ruling. Growers paying the Increased Contribution may request a private ruling about the deductibility of the amount incurred.

### **Land and Management Agreement**

43. Under Clause 9.5, the Responsible Entity is entitled to all proceeds of sale of log timber or other timber cut from the trees during Commercial Thinning.

44. Under Clause 14.3 a Grower is required to pay to the Responsible Entity an additional fee equal to 34.87% of the Net Proceeds of Sale (Additional Fee).

45. Clause 23.1(d) allows the Responsible Entity to terminate the interest of a Grower who fails to make Additional Contributions for any three years during the Five Year Period.

### **Lease and Forestry Rights Agreement**

46. Clause 9.3 allows the Responsible Entity to terminate the interest of a Grower who fails to make Additional Contributions for any three years during the Five Year Period.

### **Pooling of Timber and Net Proceeds of Sale**

47. The Land and Management Agreement sets out provisions relating to the Grower's Entitlement to Net Proceeds of Sale. This Product Ruling only applies where the following principles apply to the pooling and distribution arrangements as outlined in clause 11 of the Land and Management Agreement:

- only Growers who have contributed trees are entitled to benefit from distributions of Net Proceeds of Sale from the pool; and
- any pooled trees must consist only of African Mahogany and Teak contributed by Growers of the same Project Class.

## Appendix 1 – Explanation

**❶** *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

### **Is the Grower carrying on a business?**

48. For the expenditure set out in paragraphs 23 and 24 of this Ruling to constitute allowable deductions, the Grower's afforestation activities as a participant in the Great Southern 2007 High Value Timber Project must amount to the carrying on of a business of primary production.

49. PR 2007/7 ruled that a Grower in the Project is accepted to be carrying on a business of growing and harvesting African Mahogany and Teak trees for sale.

### **Deductions for Additional Contributions and Interest**

#### **Section 8-1**

50. The Additional Contributions in respect of a Grower's own woodlots are deductible under section 8-1. A 'non-income producing' purpose is not identifiable in the arrangement and there is no capital component evident in these fees.

51. The tests of deductibility under the first limb of section 8-1 are met. The exclusions do not apply. (Note: the meaning of incurred is explained in Taxation Ruling TR 97/7).

52. Growers may have financed their participation in the Project through a Loan Agreement with financiers listed in paragraphs 64 to 69 of PR 2007/7. Applying the same principles as that used for Additional Contributions, Interest incurred on these loans has sufficient connection with the gaining of assessable income to be deductible under section 8-1. Interest on loans other than those specified in PR 2007/7 is outside the scope of this Ruling.

### **'CGT event' within 4 years for Growers who are 'initial participants'**

#### **Section 82KZMGA**

53. A Grower who was an initial participant in the Project under PR 2007/7 cannot deduct an amount that meets the requirements of section 82KZMG of the ITAA 1936 if a 'CGT event' happens in relation to the Grower's interest within 4 years of 30 June 2007 (subsection 82KZMGA(1) of the ITAA 1936). In this Project, only the Establishment Services Fee meets the requirements of section 82KZMG of the ITAA 1936. Accordingly, the deduction of \$13,750 per woodlot for the Initial Fee will not be allowable if a 'CGT event' happens to the Grower's interest within the 4 year period. The appointment of LCL as the replacement Responsible Entity for the Project is not a CGT event in relation to a Grower's interest.

54. Where subsection 82KZMGA(1) of the ITAA 1936 applies, the Commissioner may amend any affected Grower's assessment within two years after the end of the income year in which the 'CGT event' happens. The Commissioner's power to amend in these circumstances applies despite section 170 of the ITAA 1936 (subsection 82KZMGA(2) of the ITAA 1936). The CGT event mentioned in paragraph 82KZMGA(1)(b) does not include a CGT event that happens because of circumstances outside the Grower's control (subsection 82KZMGA(1A) of the ITAA 1936).

55. A Grower whose deduction for the Establishment Services Fee is disallowed because of section 82KZMGA of the ITAA 1936 is still required to include in their assessable income either the market value of the interest at the time of the 'CGT event', or the decrease in the market value of the interest as a result of the 'CGT event' (section 82KZMGB of the ITAA 1936).

### **Deferral of losses from non-commercial business activities and the Commissioner's discretion**

#### ***Sections 35-10 and 35-55***

56. Based on information provided, a Grower accepted into the Project in the year ended 30 June 2007 who carries on a business is expected to incur losses from their participation in the Project which will be subject to Division 35. These losses will be subject to the loss deferral rule in section 35-10 unless an exception applies or, for each income year in which losses are incurred, the Commissioner exercises the discretion in subsection 35-55(1) on 30 June of that specific income year.

57. The exceptions to the loss deferral rule depend upon the circumstances of individual Growers and are outside the scope of this Ruling.

58. The Commissioner will apply the principles set out in Taxation Ruling TR 2007/6 Income tax: non-commercial business losses: Commissioner's discretion when exercising the discretion.

59. Where a Grower with income for non-commercial loss purposes of less than \$250,000 (that is, the Grower satisfies the income requirement in subsection 35-10(2E)) incurs a loss in an income year from carrying on their business activity in a way that is not materially different to the scheme described in this Product Ruling, and the discretion in paragraph 35-55(1)(b) is exercised for that year, the Commissioner will be satisfied that:

- it is because of its nature that the business activity of the Grower will not satisfy one of the four tests in Division 35; and

- there is an objective expectation that within a period that is commercially viable for the afforestation industry, the Grower's business activity will satisfy one of the four tests set out in Division 35 or produce assessable income for an income year greater than the deductions attributable to it for that year (apart from the operation of subsections 35-10(2) and (2C).

60. Where a Grower with income for non-commercial loss purposes of \$250,000 or more (that is, the Grower does not satisfy the income requirement in subsection 35-10(2E)) incurs a loss in an income year from carrying on their business activity in a way that is not materially different to the scheme described in this Product Ruling, and the discretion in paragraph 35-55(1)(c) is exercised for that year, the Commissioner will be satisfied that:

- it is because of its nature that the business activity of the Grower will not produce assessable income greater than the deductions attributable to it; and
- there is an objective expectation that within a period that is commercially viable for the afforestation industry, the Grower's business activity will produce assessable income for an income year greater than the deductions attributable to it for that year (apart from the operation of subsections 35-10(2) and (2C).

61. A Grower will satisfy the income requirement in subsection 35-10(2E) where the sum of the following amounts is less than \$250,000:

- taxable income for that year (ignoring any loss arising from participation in the Project or any other business activity);
- total reportable fringe benefits for that year;
- reportable superannuation contributions for that year; and
- total net investment losses for that year.

62. In each individual year where the Commissioner's discretion is exercised, a Grower within either paragraph 59 or paragraph 60 of this Ruling who would otherwise be required to defer a loss arising from their participation in the Project under section 35-10 until a later income year is able to offset that loss against their other assessable income.

**Sections 82KZME and 82KZMF – prepaid Additional Contribution**

63. The payment of the Additional Contribution represents a payment for maintenance services to be provided over the remaining life of the project. Accordingly, the payment of the Additional Contribution will be a prepayment which meets the requirements of subsections 82KZME(1) and (2) of the ITAA 1936. Therefore, unless one of the exceptions to section 82KZME of the ITAA 1936 applies the amount and timing of tax deductions for the Additional Contribution is determined under the formula in section 82KZMF of the ITAA 1936.

$$\text{Expenditure} \times \frac{\text{Number of days of eligible service period in the year of income}}{\text{Total number of days of eligible service period}}$$

64. In the formula, 'eligible service period' (defined in subsection 82KZL(1) of the ITAA 1936) means, generally, the period over which the services are to be provided. The eligible service period begins on the day on which the thing under the agreement commences to be done or on the day on which the expenditure is incurred, whichever is the later, and ends on the last day on which the thing under the agreement ceases to be done, up to a maximum of 10 years.

65. The 'eligible service period' in this case is 10 years as the Additional Contribution is paid for services that will be carried out over the remainder of the Project, which is a period greater than 10 years.

66. The only exception in 82KZME of the ITAA 1936 that may apply in relation to prepaid Additional Contributions is Exception 3. Under Exception 3 where the total upfront lump sum payment is less than \$1,000, the amount paid will constitute 'excluded expenditure' as defined in subsection 82KZL(1) of the ITAA 1936. 'Excluded expenditure' is not subject to section 82KZMF of the ITAA 1936 and is, therefore, deductible in full in the year in which it is incurred.

67. Therefore, where the total of the Additional Contributions a Grower pays in any year is more than \$1,000 the deduction allowable will be subject to apportionment under section 82KZMF of the ITAA 1936 (see paragraph 63 of this Ruling).

**Section 82KL – anti-avoidance provisions**

68. As stated in paragraph 33 of this Ruling and paragraphs 25 and 93 of PR 2007/7, section 82KL of the ITAA 1936 does not apply to deny the deductions otherwise allowable.

## **Part IVA – general tax avoidance provisions**

69. For Part IVA of the ITAA 1936 to apply there must be a 'scheme' section 177A, a 'tax benefit' section 177C and a dominant purpose of entering into the scheme to obtain a tax benefit section 177D.

70. The Great Southern 2007 High Value Timber Project is a 'scheme'. A Grower will obtain a 'tax benefit' from having entered into the scheme, in the form of tax deductions for that would not have been obtained but for the scheme. However, it is not possible to conclude the scheme was entered into or carried out with the dominant purpose of obtaining this tax benefit.

71. Growers to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the harvesting and sale of African Mahogany and Teak trees. There are no facts that would suggest that Growers have the opportunity of obtaining a tax advantage other than the tax advantages identified in this Ruling. There is no non-recourse financing or round robin characteristics, and no indication that the parties are not dealing at arm's length or, if any parties are not dealing at arm's length, that any adverse tax consequences result. Further, having regard to the factors to be considered under paragraph 177D(b) of the ITAA 1936 it cannot be concluded, on the information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

## **Appendix 2 – Detailed contents list**

72. The following is a detailed contents list for this Ruling:

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## References

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### *Previous draft:*

Not previously issued as a draft

### *Related Rulings/Determinations:*

TR 97/7; TR 2007/6

### *Previous Rulings/Determinations:*

PR 2007/7

### *Subject references:*

- carrying on a business
- non-commercial losses
- primary production
- producing assessable income
- product rulings
- public rulings
- tax benefit under tax avoidance schemes
- tax shelters project
- taxation administration

### *Legislative references:*

- ITAA 1936
- ITAA 1936 82KL
- ITAA 1936 82KZL
- ITAA 1936 82KZL(1)
- ITAA 1936 82KZME
- ITAA 1936 82KZME(1)
- ITAA 1936 82KZME(2)
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- ITAA 1936 82KZMG
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